

BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2019-130-E

IN RE:	)	
	)	
Ecoplexus Inc.	)	
	)	
Complainant,	)	<b>ECOPLEXUS INC'S REPLY TO SOUTH CAROLINA ELECTRIC &amp; GAS'S RESPONSE IN OPPOSITION TO MOTION TO MAINTAIN STATUS QUO</b>
v.	)	
	)	
South Carolina Electric & Gas,	)	
	)	
Defendant.	)	

---

Pursuant to R-103-829(A) of the Public Service Commission of South Carolina's ("Commission") rules, Ecoplexus Inc. ("Ecoplexus"), hereby submits this reply to South Carolina Electric & Gas's ("SCE&G") April 24, 2019 response in opposition ("SCE&G April 24 Response") to Ecoplexus' Motion to Maintain Status Quo, filed on April 15, 2019, in the above-captioned proceedings (the "Motion"). Ecoplexus files this reply to answer several deficient arguments made in the SCE&G April 24 Response. Ecoplexus looks forward to examining all underlying issues in more depth in the upcoming consolidated proceeding ordered by the Commission on April 25, 2019 in Order No. 2019-329.<sup>1</sup>

---

<sup>1</sup> See Order No. 2019-293, Docket No. 2019-130-E (Apr. 25, 2019) (Commission order consolidating the above-captioned proceeding with ongoing proceedings in Docket No. 2018-401-E, and Docket No. 2019-51-E).

## SUMMARY OF APPLICABLE BACKGROUND

On April 15, 2019, in the above-captioned proceeding, Ecoplexus filed a complaint (“Complaint”) against SCE&G showing specific violations of the Public Utility Regulatory Policies Act of 1978 (“PURPA”), several provisions of 18 C.F.R. Section 292, as well as specific violations of Commission orders related to the development of Barnwell PV1, a 74.9 MW-ac solar qualifying facility (“QF”), queue position 332 (“Barnwell”), and Jackson PV1, a 71 MW-ac solar QF, queue position 331 (“Jackson”) (collectively, the “Projects”), both owned by Ecoplexus. Among other issues addressed therein, the Complaint outlined how a series of actions and inactions by SCE&G related to the assignment of interconnection costs to the Projects demonstrated a pattern of discriminatory behavior in violation of 18 C.F.R. Section 292.306(a),<sup>2</sup> which requires QFs to pay any interconnection costs assigned to them, provided that such costs are assessed by the utility “on a nondiscriminatory basis with respect to other customers with similar load characteristics.”<sup>3</sup> The Complaint also attached a series of exhibits with documents supporting Ecoplexus’ position, and stated unequivocally that “Ecoplexus is able to provide more detailed information substantiating the claims of discriminatory treatment outlined [in the Complaint] related to the assignment of interconnection costs once the Commission establishes procedures to enable the sharing of confidential information in [the above-captioned] proceeding.”<sup>4</sup>

Concurrent with the Complaint, Ecoplexus also filed the Motion, in which it requested that that the Commission “stay Ecoplexus’s obligations to make certain payments for Barnwell

---

<sup>2</sup> See Complaint at 17-21.

<sup>3</sup> See 18 C.F.R. Section 292.306(a).

<sup>4</sup> See Complaint at 20, n. 47.

and Jackson under the terms of the [interconnection agreements (“IAs”)], as well as all other milestone obligations under the IAs, and to maintain the status quo of the IAs until the underlying proceeding initiated by the [Complaint] . . . is resolved.”<sup>5</sup> The main reason Ecoplexus requested that the Commission stay its obligation to make the milestone payments under the IAs was because “the interconnection costs assigned to the Projects by SCE&G were made in a discriminatory manner, in violation of 18 C.F.R. Section 292.306(a).”<sup>6</sup> In other words, Ecoplexus requested that the Commission stay Ecoplexus’ obligation to make milestone payments under the IA until the Commission makes a final decision on the issue of whether such milestone payments are legally permissible.

Following the submittal of the Motion and Complaint, Ecoplexus filed a letter on April 19, 2019 (the “Ecoplexus April 19 Letter”) describing how SCE&G sent two letters to Ecoplexus on April 17, 2019, which Ecoplexus received on April 18, 2019, stating that SCE&G was terminating the Projects. On April 22, 2019, SCE&G replied to the Ecoplexus April 19 Letter (the “SCE&G April 22 Letter”), in which SCE&G asked the Commission to deny the Motion, and set forth its position that the Projects’ IAs terminated pursuant to their own terms because Ecoplexus failed to make the first milestone payments that were due April 16, 2019<sup>7</sup> – which was after Ecoplexus submitted the Complaint and Motion.

On April 23, 2019, Ecoplexus responded to the SCE&G April 22 Letter (the “Ecoplexus April 23 Letter”), and noted that:

*nowhere* in the SCE&G April 22 Letter does SCE&G acknowledge that the main reason Ecoplexus is seeking to stay its obligation to make the first milestone payments for the Projects is because is its Ecoplexus’ position that the

---

<sup>5</sup> See Motion at 1-2.

<sup>6</sup> See *id.* at 2.

<sup>7</sup> See generally SCE&G April 22 Letter.

interconnection costs for the Projects, and therefore the milestone payments, were calculated in a discriminatory, *and therefore illegal*, manner.<sup>8</sup>

Ecoplexus also asserted that it “should not have to pay any milestone payments associated with the Projects until the Commission resolves the issues pending before it in the proceeding initiated by the Complaint. Any other result would significantly and materially harm Ecoplexus by requiring it to pay *millions of dollars* to SCE&G that Ecoplexus has alleged were calculated in a discriminatory, and therefore illegal, manner.”<sup>9</sup> Ecoplexus also reiterated its request that the Commission grant the Motion.

On April 24, 2019, at the Commission’s open meeting, the Commission orally stated its intention to consolidate the above-captioned proceedings with ongoing proceedings in Docket No. 2018-401-E, and Docket No. 2019-51-E, as codified in Order No. 2019-293 (the “Consolidated Proceedings”). Following the Commission’s ruling at its open meeting, SCE&G filed the SCE&G April 24 Response.

### **REPLY TO SCE&G APRIL 24 RESPONSE**

Ecoplexus looks forward to the opportunity to fully explore all issues related to the Complaint and Motion in the forthcoming Consolidated Proceedings. However, given several glaringly deficient arguments made by SCE&G in the SCE&G April 24 Response, Ecoplexus feels compelled to briefly reply to them, as set forth below.

#### **A. *The SCE&G April 24 Response Once Again Fails To Address The Core Purpose of The Motion***

The SCE&G April 24 Response contains the same fatal flaw as the SCE&G April 22 Letter, in that it fails to acknowledge or address the fact that the core reason Ecoplexus is

---

<sup>8</sup> See Ecoplexus April 23 Letter at 1 (emphasis in original).

<sup>9</sup> See *id.* at 2 (emphasis in original).

requesting a stay of its obligations to make milestone payments pursuant to the IAs is because Ecoplexus is challenging the underlying validity of those payments and whether such payments were calculated in a legally permissible manner.

However, SCE&G does not seem to care that Ecoplexus has challenged the very legality of these for the reasons specified in the Complaint. Instead, SCE&G's interpretation of the IAs and South Carolina Generator Interconnection Procedures, Forms and Agreements ("South Carolina Standard"), as applied to the facts at hand, seems to be that because the IAs and South Carolina Standard require payment of the milestone payments by a certain date, the IAs and South Carolina Standard must be complied with at all costs, even if the interconnection costs required to be paid under the IAs and South Carolina Standard have alleged to be illegal under federal law. In other words, SCE&G's position essentially subordinates federal law (PURPA and 18 C.F.R Section 292.306(a), which is one of the Federal Energy Regulatory Commission ("FERC") regulations implementing PURPA) to a contract (*i.e.* the IAs). It is axiomatic that such a position is incorrect, as it is a generally accepted principle that contracts incorporate the law in force at the time that a contract is in effect, and thus cannot override such law.<sup>10</sup>

*B. Requiring Ecoplexus to Make Milestone Payments At This Time Would Materially Harm Ecoplexus*

SCE&G's position that Ecoplexus faces "no harm in simply making the First Milestone Payments, even if it believed the total amount to be inaccurate,"<sup>11</sup> is plainly incorrect. Ecoplexus is not averring that the milestone payments are merely "inaccurate",<sup>12</sup> Ecoplexus is averring that

---

<sup>10</sup> See *e.g. Acosta v. Tyson Foods*, 800 F.3d 468, 474 (8th Cir. 2016) (noting the principle that current laws of the time and place where a contract is made are incorporated into the contract); *United Van Lines, Inc. v. United States*, 448 F.2d 1190, 1195 (D.C.Cir.1971) ("Because the regulation was in existence at the time [the party] entered on performance, it became, in effect, a part of the contract between the parties.").

<sup>11</sup> See SCE&G April 24 Response at 7.

<sup>12</sup> See *id.*

the milestone payments were calculated in a discriminatory manner in violation of federal law. Moreover, the “harm” suffered by Ecoplexus would be needing to pay more than \$10 million in interconnection costs to SCE&G which Ecoplexus is alleging was illegally allocated to it. While SCE&G may have a different opinion as a regulated utility that can pass on many of its costs to ratepayers, it is not reasonable to believe that \$10 million is a trivial amount of money for any company to pay to another company, particularly here, where Ecoplexus is alleging that the amount is not required to be paid under applicable law.

*C. The FERC Precedent Relied Upon by SCE&G Does Not Support Its Position*

Next, the FERC precedent relied upon by SCE&G does not support its position in any way. The is because in *none* of the cases cited by SCE&G<sup>13</sup> did the interconnection customers not make payments to a utility because they alleged that the underlying payments required under the applicable interconnection agreements were calculated in a manner that violated PURPA, 18 C.F.R. Section 292.306(a), or were otherwise illegal.<sup>14</sup> However, this is precisely what Ecoplexus has alleged in the Complaint, and is seeking a stay of its obligation to make any such payments in the Motion. The fact that Ecoplexus is challenging the legality of the underlying interconnection costs being assigned to it is a key distinguishing feature from the cases cited by SCE&G, and is a distinction that SCE&G’s position fails to acknowledge.

---

<sup>13</sup> See SCE&G April 24 Response at 8 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198 (2014) (“MISO”); *Pacific Gas & Electric Co.*, 146 FERC ¶ 61,120 (2014) (“PG&E”). Ecoplexus could not identify a case with the citation of “*Midwest Independent Transmission System Operator, Inc.*, 143 FERC ¶ 61,709 (2013)” as set forth in the SCE&G April 24 Response. Accordingly, it is not clear what, if any, case SCE&G is citing to support its position.

<sup>14</sup> Specifically, in *MISO*, the interconnection customer simply failed to make the required interconnection payment required under MISO’s tariff after being notified of the breach and failing to cure. In *PG&E*, the interconnection customer did not make a required financial security payment.

Furthermore, the plain language of 18 C.F.R. Section 292.306(a) cuts against SCE&G's position that Ecoplexus needs to make any interconnection milestone payments at this time. 18 C.F.R. Section 292.306(a) states clearly that "[e]ach qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility *on a nondiscriminatory basis with respect to other customers with similar load characteristics.*"<sup>15</sup> Ecoplexus has presented strong evidence in the Complaint that such interconnection costs were made on a discriminatory basis – none of which has been directly answered by SCE&G. Unless and until it is determined by the Commission that the interconnection costs made by SCE&G were made in a non-discriminatory basis, Ecoplexus should not be required to make any milestone payments to SCE&G, as such payments would be in violation of 18 C.F.R. Section 292.306(a). This is precisely the relief that the Motion requests.

*D. Additional Arguments By SCE&G Lack Credibility*

Two additional arguments made by SCE&G in the SCE&G April 24 Response are simply not credible. First, SCE&G's argument that the Motion does not provide a basis for relief because it did not "present 'a concise and cogent statement of the facts' to the Commission or otherwise provide appropriate grounds to grant the requested relief"<sup>16</sup> is nonsensical. The Motion made clear that the facts and circumstances giving rise to the relief requested were outlined in the Complaint, which was submitted contemporaneously with the Motion in the same

---

<sup>15</sup> 18 C.F.R. Section 292.306(a) (emphasis added).

<sup>16</sup> See SCE&G April 24 Response at 5 (citations omitted).

proceeding.<sup>17</sup> It strains credulity to argue that the Complaint and Motion together do not outline “a concise and cogent statement of the facts” giving rise to the relief sought in the Motion.

Second, SC&G’s argument that granting the relief sought in the Motion would harm other interconnection customers is a red herring.<sup>18</sup> Ecoplexus has alleged that SCE&G has discriminated against it in assigning interconnection costs to the Projects in a manner that violates, *inter alia*, 18 C.F.R. Section 292.306(a). The Complaint details how SCE&G engaged in this discriminatory behavior, and SCE&G to date has not directly refuted any of the facts and arguments set forth by Ecoplexus in the Complaint. SCE&G’s argument – that granting the Motion would discriminate against other projects in its interconnection queue – fails to appreciate the fact that the Complaint has alleged significant discriminatory and illegal actions and inactions on the part of SCE&G. Accordingly, the “special or unique circumstances which justify disparate treatment” for Ecoplexus compared to “other similarly-situated developers”<sup>19</sup> are the facts and circumstances outlined in the Complaint demonstrating SCE&G’s discriminatory treatment towards Ecoplexus in violation of, *inter alia*, 18 C.F.R. Section 292.306(a).<sup>20</sup>

## CONCLUSION

Ecoplexus respectfully requests that the Commission accept its reply herein, reject the arguments made by SCE&G in the SCE&G April 24 Response, and grant the Motion.

---

<sup>17</sup> See Motion at 2.

<sup>18</sup> See SCE&G April 24 Response at 7-8.

<sup>19</sup> See *id.* at 8.

<sup>20</sup> In making this statement, Ecoplexus does not know whether or not other solar developers have been subjected to similar discriminatory treatment by SCE&G when interconnection costs have been assigned to their projects. However, to Ecoplexus’ knowledge, it is the only solar development that has to date filed a complaint against SCE&G alleging such discriminatory treatment in violation of 18 C.F.R. Section 292.306(a).



NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Weston Adams, III

Weston Adams, III (SC Bar No. 64291)

E-Mail: weston.adams@nelsonmullins.com

Jeremy C. Hodges (SC Bar No. 71123)

E-Mail: jeremy.hodges@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Complainant

Columbia, South Carolina

Dated: April 29, 2019.

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2019-130-E

IN RE:	)	
	)	
Ecoplexus Inc.	)	
	)	Certificate of Service
Complainant	)	
	)	
vs.	)	
	)	
South Carolina Electric & Gas	)	
	)	
Defendant	)	
	)	

---

This is to certify that I, Jeremy C. Hodges, have this date served one copy of a Reply to SCE&G's Response in Opposition to the Motion to Maintain Status Quo in the above referenced matter to the person(s) named below by electronic mail, as shown below:

Jenny R. Pittman  
jpittman@ors.sc.gov  
Office of Regulatory Staff  
Legal Department  
1401 Main St., Ste 900  
Columbia, SC 29201

K. Chad Burgess  
Chad.burgess@scana.com  
South Carolina Electric & Gas Company  
220 Operation Way - MC C222  
Cayce, SC 29033-3701

J. Ashley Cooper  
Ashleycooper@parkerpoe.com  
Parker Poe  
200 Meeting Street / Suite 301  
Charleston, SC 29401

s/  
Jeremy C. Hodges

Dated: April 29, 2019.